

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

-----  
TONI PAUL CAYTON,

Petitioner,

v.

ORDER

08-cv-571-bbc

JOHN BETT, STEVE CASPERSON, GREG GRAMS,  
GLEN SINGER, MARDELL PETRAS, DAVID WHITE,  
MARK HEISE, MOLLY SULLIVAN, GERALD KONITZER,  
DAVID WHITCOMB, GREGORY SMITH, GERALD BERGE,  
TRACY GERBER, SGT. ROBERTSON, SGT. MCCARN, SGT.  
KARTMAN, SGT. ASPERSON, CORRECTIONAL OFFICER  
JONES, CAPTAIN GILBERG, SGT. HUIBRETGSE, TIM HAINES,  
LT. C. KELLAR, JUDY SCHELKE, JAMES SPANBERG, JANEL  
NICKEL, CAPT. BRIAN BANTLEON, THOMAS SPEECH  
and DENNIS KAVANAUGH,

Respondents.  
-----

On October 23, 2008, I denied petitioner's request to proceed on appeal in forma pauperis because he has struck out under 28 U.S.C. § 1915(g) and the matter he wishes to appeal does not qualify for imminent danger exception in 28 U.S.C. § 1915(g). On October 29, 2008, petitioner filed what appeared to be a second notice of appeal. However, because a motion under Fed. R. App. P. 24(a)(5) is the appropriate next step for a petitioner

whose request for leave to proceed in forma pauperis on appeal has been denied in the district court, I construed petitioner's second notice as such a motion and forwarded it to the court of appeals. Now petitioner has filed a motion to transmit the record to the court of appeals.

Petitioner's motion will be denied as unnecessary. If the court of appeals determines that this court erred in denying petitioner leave to proceed in forma pauperis on appeal because of his three-strike status, it will order this court to collect an initial partial payment of the filing fee from petitioner. If the court determines that no error has been made, it will order petitioner to prepay the full filing fee. In either event, the court of appeals will not request that the record of this case be transmitted to it until petitioner pays whatever fee is determined to be required. If and when the court of appeals asks for the record, it will be transmitted promptly.

Also, petitioner expresses concern that the court of appeals has assigned two case numbers to his appeal: one to the original appeal, and one to the second notice that has been construed by this court to be a motion under Fed. R. App. P. 24(a)(5). Ordinarily, in circumstances such as this, the court of appeals dismisses the inappropriately titled "notice of appeal." If it does not, however, petitioner is free to communicate directly with the court of appeals to ask for correction of the matter.

ORDER

IT IS ORDERED that petitioner's motion to transmit the court record to the court of appeals (dkt. # 19) is DENIED as unnecessary.

Entered this 13<sup>th</sup> day of November, 2008.

BY THE COURT:

/s/

---

BARBARA B. CRABB  
District Judge